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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 CURTIS J. WILLIAMS,

11 Plaintiff,

No. CIV S-05-0164 JAM EFB P

12 vs.

13 R. W. SANDHAM, et al.,

14 Defendants.

ORDER

15 \_\_\_\_\_/  
16 Plaintiff is a state prisoner proceeding without counsel in an action brought under 42  
17 U.S.C. § 1983. The only claim remaining in this action is whether defendants were deliberately  
18 indifferent by denying plaintiff a particular medication for his eye condition, i.e., Muracel 1%  
19 eye drops. Currently pending is defendant Rohlfig's motion to withdraw admissions. For the  
20 reasons explained below, defendant's motion is granted.

21 **I. Facts**

22 Plaintiff served requests for admissions on defendant Rohlfig. Plaintiff's third request  
23 states, "[a]dmit that J. Rohlfig, M.D. denied the non-formulary request for the Muracel 1% on  
24 March 26, 2003." Dckt. 109, Stringer Declaration, Exhibit A (hereafter "Stringer Dec. Ex. A"),  
25 at 3. Defendant admitted this fact. *Id.* Plaintiff's fourth request stated, "[a]dmit that J. Rohlfig,  
26 M.D. continued to order the Muracel 1% after he denied the non-formulary request." *Id.*

1 Defendant also admitted this fact. The significance of these admissions was apparent in the  
2 papers filed in regard to defendant's summary judgment motion.

3 Defendant moved for summary judgment on the issue of whether a reasonable jury could  
4 find deliberate indifference to plaintiff's medical condition and specifically his need for drops to  
5 treat his eyes. In his opposition to defendants' motion for summary judgment, plaintiff  
6 submitted Rohlring's answers to interrogatories which state that he lacked the experience to  
7 know, for therapeutic purposes, the difference between Muracel 1% and Muracel .5%. Records  
8 that Rohlring submitted in support of his motion for summary judgment show that he prescribed  
9 the 1% solution on March 12, 2003, April 22, 2003, August 5, 2003, September 8, 2003, and  
10 September 22, 2003. Def. Rohlring's Mot. for Summ. J., Ex. C, at 2-5, 9, 11, 13, 14. On April  
11 22, 2003, Rohlring noted "nonformulary filled out." *Id.* at 4. On August 27, 2003, he ordered a  
12 0.5 % solution instead of the 1% solution. Mot. for Summ. J., Ex. C, at 10. On September 8,  
13 2003, he noted that plaintiff had been receiving Murocel 0.5% solution and that plaintiff reported  
14 the 1% worked better. *Id.* at 11. Dr. Rohlring "discussed this with the pharmacist who said he  
15 cannot get the 1%. The most his wholesaler has is 0.5%." *Id.* Therefore, although Rohlring  
16 prescribed the 1% solution, he said that the 0.5% could be given if the other was unavailable. *Id.*  
17 Again, on September 22, 2003, defendant noted that plaintiff reported that the "½ % Murocel is  
18 not as good as the 1% although the 1%, according to pharmacy, cannot be obtained here." *Id.* at  
19 13. He further noted, "[i]t can possibly be obtained at other institutions, there is no indication  
20 that it is necessary." *Id.*

21 On summary judgment, the district judge found that there was evidence that Dr. Rohlring  
22 denied a request to obtain the eye drops from an outside pharmacy. The district judge further  
23 found that:

24 [P]laintiff has provided evidence that Dr. Rohlring may have intentionally denied  
25 plaintiff the requisite strength eye drops. According to plaintiff, Dr. Rohlring told  
26 plaintiff that he could not dispense Muracel 1% because the prison pharmacy did

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1 not keep it in stock. But plaintiff has provided evidence that Dr. Rohlfing could  
2 have obtained the eye drops from an outside pharmacy and that Dr. Rohlfing denied  
a request to do so.

3 March 29, 2007, Order at 2:16-20. Thus, whether Rohlfing denied a request to obtain the 1%  
4 solution from an outside pharmacy will be a key issue at trial and the admission in question have  
5 relevance..

## 6 **II. Standards**

7 Rule 36 of the Federal Rules of Civil Procedure prescribes when an admission may be  
8 withdrawn:

9 A matter admitted under this rule is conclusively established unless the court, on  
10 motion, permits the admission to be withdrawn or amended. Subject to Rule  
11 16(e), the court may permit withdrawal or amendment if it would promote the  
presentation of the merits of the action and if the court is not persuaded that it  
would prejudice the requesting party in maintaining or defending the action on the  
12 merits.

13 Fed. R. Civ. P. 36(b). The Ninth Circuit's articulation of this standard is that,

14 before an admission may be withdrawn: (1) presentation of the merits of the  
15 action must be subserved, and (2) the party who obtained the admission must not  
be prejudiced by the withdrawal.

16 *Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 1995). The first part of the test "is  
17 satisfied when upholding the admissions would practically eliminate any presentation of the  
18 merits of the case." *Id.* at 1348. The second part is satisfied when the party who would benefit  
19 from the admission would face difficulty in proving his case, as by the unavailability of  
20 witnesses because of a sudden need to obtain evidence with respect to the matter previously  
21 deemed admitted. *Id.* The court considers these factors in turn.

## 22 **III. Analysis**

### 23 **A. Presentation of the Merits**

24 Under this prong of the test, an admission may be withdrawn if, as a practical matter,  
25 there would be no need to present the merits of the case if the admission were to remain on  
26 record. The issue for trial here is whether Rohlfing knew, or inferred from the circumstances,

1 that plaintiff needed Murocel 1%, but denied plaintiff's request for it. Dr. Rohlring's response to  
2 plaintiff's requests admitted that he "denied the non-formulary request for [] Muracel 1% on  
3 March 26, 2003." This admission is highly relevant to whether defendant did what he could to  
4 treat plaintiff's condition.

5 In moving to withdraw the admission, Rohlring asserts that it is inaccurate because he  
6 lacked authority to deny a request for a non-formulary medication. He asserts that only the  
7 Chief Physician and Surgeon or the Chief Medical Officer had this authority. There is no  
8 documentary evidence in the record showing what defendant did, if anything, with respect to  
9 plaintiff's care on March 23, 2003. There is evidence, however, that defendant Rohlring  
10 requested others to obtain the non-formulary medication after that date. On April 22, 2003,  
11 Rohlring completed a "non-formulary" request and discussed the matter with officials from the  
12 pharmacy, who informed him that the 1% solution was not available from the wholesaler. He  
13 repeatedly prescribed the 1% solution after March 32, 2003, and noted that the 0.5% solution did  
14 not seem to help plaintiff as much as the 1%. In August he discussed the matter with the  
15 pharmacist and in September he again prescribed the 1% solution, noting that if only the 0.5%  
16 were available, that would have to do. Thus, despite the admission, it is not at all clear that Dr.  
17 Rohlring himself denied a non-formulary request on March 26, 2003. Permitting the admission  
18 to stand would seriously hinder the exploration of an important aspect of liability, i.e., Rohlring's  
19 authority to obtain medication plaintiff allegedly needed, which is essential not only to plaintiff's  
20 case, but also to Rohlring's defense. For these reasons, the court finds that the first prong of the  
21 test for withdrawing the admission is satisfied.

## 22 **B. Prejudice**

23 Under this part of the test, the question is whether permitting withdrawal would make it  
24 difficult to prove his case in some manner that is unfair to him, such as an unexpected need to  
25 obtain evidence to prove what the admission essentially proved alone. In opposing defendant's  
26 motion, plaintiff has not explained what other evidence he would have to obtain in order to prove

1 Rohlfinding's alleged March 23 denial. If plaintiff has documentary evidence of the March 23,  
2 2008, denial he can call Rohlfinding as a witness and ask whether he denied the request. If  
3 Rohlfinding says he did not and plaintiff has documentary evidence to the contrary, he can impeach  
4 Rohlfinding with it. Thus far plaintiff has not alleged that a nurse or other medical staff was present  
5 during plaintiff's appointments with Rohlfinding. Therefore, it is not likely that there are other  
6 witnesses to these events. In short, plaintiff has not shown any prejudice other than the loss of  
7 an opportunity to take advantage of what appears to be a mistake in answering the discovery  
8 request. That does not constitute legal prejudice. For these reasons, the court finds that this  
9 prong of the test also is satisfied.

#### 10 **C. Rule 16(e)**

11 Before trial, the court may hold a pretrial conference in order to plan for trial and to  
12 facilitate the admission of evidence. Fed. R. Civ. P. 16(e). Following the conference, the court  
13 generally issues an order that may be modified "only to prevent manifest injustice." *Id.* Here,  
14 no final pretrial conference has been held. Therefore, the court has not made an order pursuant  
15 to Rule 16(e). Thus, the finality of a pretrial order and the conditions under which the court may  
16 modify it do not bear on defendant Rohlfinding's motion to withdraw his admission.

#### 17 **IV. Conclusion**

18 For the reasons explained, the court finds that defendant Rohlfinding must be permitted to  
19 withdraw his admission that on March 23, 2003, he denied plaintiff's request for Murocel 1%  
20 solution.

21 Accordingly, it is ORDERED that:

22 1. Defendant's February 20, 2008, motion to withdraw admissions is granted and that  
23 defendant is permitted to withdraw the following:

24 a. His entire response to plaintiff's third request for admission; and,

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1           b. The portion of his response to plaintiff's fourth request for admission referring to his  
2 denial of plaintiff's request for a non-formulary medication.

3 Dated: March 11, 2009.

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5 EDMUND F. BRENNAN  
6 UNITED STATES MAGISTRATE JUDGE  
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